APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-1085

ARKANSAS-PLATTE & GULF PARTNERSHIP,
a Colorado general partnership,
Plaintiff-Appellee,
v.

VAN WATERS & ROGERS, INC., a Washington corporation;
THE DOW CHEMICAL COMPANY, a Delaware corporation,
Defendants-Appellants.

NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION; WESTERN AGRICULTURAL CHEMICALS ASSOCIATION; NATIONAL PEST CONTROL ASSOCIATION; NATIONAL AGRICULTURAL AVIATION ASSOCIATION; CHEMICAL SPECIALTIES; AMERICAN WOOD PRESERVERS INSTITUTE; CHEMICAL MANUFACTURERS ASSOCIATION; PRODUCT LIABILITY ADVISORY COUNCIL, INC.; TRIAL LAWYERS FOR PUBLIC JUSTICE,
Amici Curiae.

OPINION AND ORDER ON REMAND

[Filed Jan. 5, 1993]

Appeal from the United States District Court
for the District of Colorado
D.C. No. 89-S-1726

Richard R. Young, Brent E. Rychener, and Walter H. Sargent, Holme Roberts & Owen, Colorado Springs, Colorado, for Plaintiff-Appellee.

David A. Bailey, Dean R. Massey, and Anne D. Weber, Parcel, Mauro, Hultin & Spaanstra, P.C., Denver, Colorado, for Defendant-Appellant, Van Waters & Rogers Inc.

C. Michael Montgomery and Peter S. Dusbabek, Montgomery, Green, Jarvis, Kolodny & Markusson, Denver, Colorado, for Defendant-Appellant, The Dow Chemical Company.

Before LOGAN and MOORE, Circuit Judges, and ALLEY, District Judge.*

MOORE, Circuit Judge.

After examining the briefs this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(e); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

This case is before us on remand from the Supreme Court. To aid our compliance with the mandate, we ordered the parties to file simultaneous briefs discussing the applicability of *Cipollone v. Liggett Group, Inc.*, —— U.S. ——, 112 S. Ct. 2608 (1992). Having considered the matters on file, we conclude we must adhere to the opinion previously rendered in this case. *Arkansas-Platte v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir. 1992).

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* The Honorable Wayne E. Alley, United States District Court Judge for the Western District of Oklahoma, sitting by designation.

The mandate gave no specific direction to us; therefore, the parties have differing views of the scope of the remand. Plaintiff, Arkansas-Platte, broadly reads the remand, but defendants take a more narrow view.

Plaintiff argues as a result of the remand our entire holding has been vacated, including our determination that pre-1972 law does not apply to this case. To the contrary, argue the defendants. They contend the Court has sent us only one issue for consideration and that is whether *Cipollone* reverses our holding that 7 U.S.C. § 136v(b) preempts a state common law duty to warn. Thus, our first consideration is to decide the effect of the Court's remand.

Plaintiff has always, but unsuccessfully, argued the law in effect in 1987, the year in which contamination was discovered, does not apply to its claims agaist defendants. It contends liability must be predicated upon defendants' conduct prior to the time of the discovery. That issue was hotly contested, and we resolved it in favor of defendants by holding the claim did not arise until after the 1972 amendment of FIFRA. *Arkansas-Platte*, 959 F.2d at 160-61. Without a lengthy discussion, we held plaintiff's claim did not exist until it acquired the contaminated property.

Plaintiff now contends the Court reversed this holding. It points out Mrs. Cipollone's cancer was not diagnosed until 1984; therefore, her claim did not arise until that time. Yet, the Court's analysis of the Cipollone claim took into account statutes that existed before 1984. Therefore, plaintiff reasons, the Court must have disapproved our analysis of when Arkansas-Platte's claim arose. This argument is not persuasive.

Mrs. Cipollone started smoking and therefore was exposed to the consequences of tobacco smoke in 1942. Thus, her claim must logically be a continuing claim that has its foundation in the events that occurred when

she first started to smoke. In contrast, until Arkansas-Platte came into possession of the contaminated property it had no claim against the defendants. Neither it nor any of its employees had any exposure to defendants' products until Arkansas-Platte moved onto the contaminated premises. Therefore, assuming plaintiff has any claim at all, it can only arise from its ownership of that land.[1]

Nonetheless, a more significant reason belies plaintiff's argument. We find no indication in *Cipollone* that a question was ever raised, let alone decided, about when the plaintiff's claim arose in that case. Thus, not only is the timing and nature of Mrs. Cipollone's claim different from that of the plaintiff in this case, but also her case reflects no holding of the Supreme Court about the ripening of that claim.

In short, although it is not disputed plaintiff has never given up on the issue of when its claim arose, we do not believe the remand encompasses our holding on that question. That belief is further supported by the fact that the only issue this case has in common with *Cipollone* is the issue of preemption. Therefore, we shall only reconsider our holding on that issue.[2]

After reviewing the briefs and the Court's holding, we conclude *Cipollone* does not require a conclusion different than the one we reached initially. We determined the legislative language relating to labeling contained in 7 U.S.C. § 136v(b) results in preemption, and *Cipollone* does not undercut that determination. Indeed, our conclusion is re-enforced because the labeling provision of § 136v(b) is as inclusive as that contained in § 5(b) of the Public Health Cigarette Smoking Act of 1969,

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[1] We are not declaring, however, Arkansas-Platte has *any* claim against defendants. We refer only to the *time* whatever claim it may have arisen.

[2] Because of this analysis, augmentation of the record is unnecessary.

15 U.S.C. 1334(b), which the Court held constituted a preemption of state common law labeling and duty to warn claims. *Cipollone*, 112 S. Ct. 2621-22.

Section 136v(b) prohibits a state from imposing "*any* requirement for labeling or packaging in addition to or different from those required under this subchapter." (emphasis added). In comparison, section 5(b) of the Cigarette Smoking Act states:

> *No* requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

(emphasis added). Although the words employed in § 136v(b) of FIFRA are different from those in § 5(b) of the Cigarette Smoking Act, their effect is the same. Section 136v(b) exists in the context of what federal law permits the state to regulate, and it simply deprives the state of power to adopt *any* regulation. This is as broad as the § 5(b) proscription.

We believe also the prohibition of "any" requirement is the functional equivalent of "no" requirement. We see no difference between the operative effect of the two acts.

Morover, when Congress, in § 136v(b) stated, "Such state shall not impose or continue in effect any requirements for labeling or packaging *in addition to or different from* those required under this subchapter," it gave a "reliable indicium of congressional intent with respect to state authority." *Cipollone*, 112 S. Ct. at 2618. We believe Congress circumscribed the area of labeling and packaging and preserved it only for federal law. With the same stroke, Congress banned any form of state regulation, and the interdiction law is clear and irrefutable.

While plaintiff argues a congressional preemption of state law extends to positive legislative acts only, we do

not agree. When one looks to the purpose underlying both legislative regulation of labeling and packaging and a state common law duty to warn, it becomes evident those purposes are the same. Indeed, a state common law duty to warn is nothing more than a duty to label a product to provide information. In that sense, the common law duty is no less a "requirement" in the preemption scheme than a state statute imposing the same burden. The objectives of the common law duty and a regulatory statute are the same. Both address a manufacturer's duty to convey information about a product through the medium of a label. That a common law action can result in an award of damages to an injured party does not detract from the ultimate purpose of imposing a duty to warn the users of a product about its potential dangers or other properties. Therefore, we believe it only logical to hold that the common law duty to warn is subjected to the same federal preemptive constraints as a state statute. *Cipollone,* 112 S. Ct. at 2620 (state regulation can be accomplished by an award of damages or by legislative enactment). A common law failure to warn case is inherently retrospective, measuring the consequences of what has already happened. A plaintiff's victory in such a case may only state the defendant's warning, if any, was insufficient, rather than specifying exactly what warning is requisite. The common law standard is generic. In contrast, the FIFRA warning scheme is prospective and specific. To the extent that state tort claims in this case require a showing that defendants' labeling and packaging should have included additional, different, or alternatively stated warnings from those required under FIFRA, they would be expressly preempted.

We hold *Cipollone* supports our previous judgment in this case. Accordingly, we ADHERE to the opinion previously announced in 959 F.2d 158. Appellee's motion to file a supplemental appendix is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JUDGE DANIEL B. SPARR

Civil Action No. 89 S 1726

ARKANSAS PLATTE & GULF PARTNERSHIP,
Plaintiff,

v.

VAN WATERS & ROGERS INC., *et al.*,
Defendants.

ORDER

[Filed Oct. 22, 1990]

THIS MATTER comes before the Court on Defendant Dow Chemical's motion for summary judgment, filed January 31, 1990. Oral argument on the motion was heard August 13, 1990.

PROCEDURAL BACKGROUND

Defendant Dow Chemical [1] bases its brief in support of summary judgment on three contentions: (1) the alleged failure to warn on the part of Defendant Dow, if any, did not cause plaintiff's damages as a matter of law; (2) Plaintiff lacks standing to bring an action for the property damages it seeks; and (3) Plaintiff's state law tort claims are preempted by federal law and accordingly are

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[1] Defendant Van Waters & Rogers has joined in the relevant pleadings by Dow Chemical in support of its motion for summary judgment.

barred. At the hearing of Defendant's motion, the first argument was withdrawn, as the Defendant conceded that the causality question was factual in nature. At that time, the Court also denied the second argument, determining that the standing issue concerned assignment which was an issue of fact. Having determined that summary judgment was improper on the Defendant's first two arguments, the Court took under advisement the third argument, concerning application of the preemption doctrine. This order will address exclusively the presumption argument.

Defendant Dow Chemical (hereafter "Dow"), alleges that the statutory scheme of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") found at 7 U.S.C. § 136 et seq., preempts the Plaintiff's cause of action cognizable under state tort law arising from an alleged failure to warn due to the inadequacy of the labeling of the chemical "Dowicide 7." [2]

FACTUAL BACKGROUND

It is undisputed that, during the years 1960-1972, Plaintiff's predecessors operated a wooden fence post treatment facility on their ranch property. The posts were soaked in a pentachlorophenol solution which greatly increased the durability of the posts. The chemical used in the procedure is more commonly referred to as "penta." Defendant's product "Dowicide 7" is a form of penta.

Plaintiff instituted this lawsuit claiming that the penta which was spilled or otherwise came into contact with the property caused the ranch to become a contaminated site. In their complaint, Plaintiff makes a negligent failure to warn claim, alleging that, among other things, the Defendants failed to provide any warning to the owners (of the property) of the potential environmental risks or

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[2] With regard to the Plaintiff's strict liability claim, the Defendant, relying on the decision of *Kennan v. Dow Chemical*, 717 F.Supp. 799 (M.D. Fla. 1989) makes no claim of preemption.

hazards to the property which might result from such use.

Plaintiff commenced the suit after it discovered penta contamination after the soil was tested. The soil tests were undertaken after the notification of the Plaintiff by one of its employees, Edward Seger, that he had been diagnosed as having penta poisoning. The Plaintiff's cause of action, however, does not concern Seger's personal injury.

Before this Court undertakes any analysis of the preemption question as it relates to FIFRA, and in particular the negligent failure to warn claim, it must be noted that there are several courts which have already considered this very question, and many more that have dealt with other questions regarding preemption. These cases will be noted and, where appropriate, discussed.

The wealth of case law on this issue is somewhat puzzling. The cases provide almost an even split of authority. There are some threads of consistency in determining some of these preemption questions. This Court will attempt to undertake an analysis which is not necessarily outcome determinative.

THE PLEADINGS

Defendant Dow Chemical filed its motion for summary judgment on January 31, 1990. Dow relies on two arguments in its preemption argument: (1) FIFRA preempts Plaintiff's negligence claim due to its comprehensive regulation of pesticides (focusing on the FIFRA provision found at 7 U.S.C. § 136v(b), entitled "uniformity," under the heading of 136v for "Authority of States." That provision states: "such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act."); and (2) Plaintiff's tort claim based on the inadequacy of the label must fail as FIFRA prohibits any state regulation of the area of labeling, and any recovery under

state law would, in effect, amount to prohibited regulation. Dow relies heavily on the preemption analysis of *Kennan,* 717 F.Supp. 799 and *Fitzgerald v. Mallinckrodt,* 681 F.Supp. 404 (E.D. Mich. 1987).

Plaintiff's opposition was filed March 9, 1990. Plaintiff argued that there was no preemption of its negligence claim, relying on *Ferebee v. Chevron Chemical Co.,* 736 F. 2d 1529 (D.C. Cir. 1984) *cert. denied* 469 U.S. 1062 (1984) rejected Dow's arguments that EPA approval of a manufacturer's claim did not compel a jury to find the same, and distinguishing the different, but not competitive, goals of FIFRA and state tort law. Plaintiff maintained that the requirement of EPA approval of label does not prevent state from furthering traditional tort goals. Plaintiff cites to several cases which have adopted the *Ferebee* reasoning, or cited it with approval. (Including several federal as well as state cases.) Plaintiff also argues that since the FIFRA was extensively revised by Congress in 1988, after the *Ferebee* decision, and no effort was made to statutorily overrule the decision, it can be presumed that Congress has adopted that interpretation of FIFRA. Plaintiff criticizes also the *Fitzgerald* case for its reliance on *Palmer v. Liggett Group,* 825 F. 2d 620 (1st Cir. 1987), a case concerning the Cigarette Act. Plaintiff undertakes a rudimentary preemption analysis, and urges the Court to align itself with those decisions finding no preemption.

At oral argument of the motion before this Court on August 13, 1990, the Plaintiff raised an additional argument, to which Dow has responded, which urges the Court to apply pre-1972 law to Plaintiff's claims. This argument was effectively raised at the time of the hearing [3] and Dow filed its supplemental response on August 17, 1990. The Court will not concern itself with any analysis of pre-1972 FIFRA law and the status of Plain-

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[3] The argument was first raised by Plaintiff in a pleading filed (Friday) August 10, 1990 at 4:55 p.m. The oral argument was held the morning of August 13, 1990.

tiff's tort claims under such provisions. Plaintiff's arguments are unavailing and would only provide unnecessary confusion to the already muddy waters of preemption doctrine analysis. Because it appears that some of Plaintiff's claims may not have existed under pre-1972 FIFRA analysis, and the fact that the Court is bound to apply the law in effect at the time it renders its decision, unless there would result a manifest injustice, *Bradley v. Richmond School Board,* 416 U.S. 696, 711 (1974), this order will not consider the pre-1972 FIFRA argument.

PREEMPTION DOCTRINE ANALYSIS

At the outset it must be noted that the Court properly considers a number of factors when undertaking a preemption analysis of statutory language or common law on either the federal or state level. The court must consider the relationship between the state and federal laws as they are interpreted and applied, not merely as they are written. *Jones v. Rath Packing,* 430 U.S. 519, 526 (1977).

The burden of proving preemption is on the movant. Dow must show that Congress intended to preclude state tort damage awards when it promulgated 7 U.S.C. § 136v (b) or as reflected in the FIFRA statute as a whole. The question is more accurately directed not towards whether Congress expressly allowed such damage awards, but rather, since tort damage awards have long been a part of traditional state tort law, to the question of whether Congress expressly supplanted them. Without an express preclusion of such awards, it must be assumed that such tort law principles would apply with full force and effect. *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 255 (1984).[4] Dow must overcome this burden.

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[4] It should be noted here, however, as the court in *Palmer v. Liggett Group, Inc.,* 825 F.2d at 628, pointed out, the *Silkwood* case involved the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.,* which contained no preemption provision.

1. The Historical Underpinnings of the Preemption Doctrine

The Supremacy Clause of Article XI, clause 2 of the United States Constitution provides: "[t]he Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the land. . . ." U.S. Const., Art. VI, cl. 2. It is a familiar and well-established principle that the Supremacy Clause . . . invalidates state laws that "interfere with, or are contrary to," federal law. *Hillsborough County, Fla. v. Automated Medical Labs*, 471 U.S. 707, 713 (1985), *citing Gibbons v. Ogden*, 9 Wheat. 1 (1824).

The preemption clause may apply to federal common law as well as state statutory or common law. Justice Rehnquist noted this distinction in *Milwaukee v. Illinois*, 451 U.S. 304 (1981):

> [T]he appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law. In considering the latter question 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' (Quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).)

The Supreme Court has articulated in *Louisiana Public Service Comm'n v. Federal Communications Comm'n*, 476 U.S. 355 (1986) an oft-cited listing of factors for preemption analysis, which has served to be instructive to many courts, but nonetheless offers little help in providing any practical means of analysis or "test" for trial courts:

> The Supremacy Clause of Article VI of the Constitution provides Congress with the power to preempt state law. Preemption occurs when Congress, in

enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), when there is outright or actual conflict between federal and state law, *e.g., Free v. Bland*, 369 U.S. 663 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and having no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

See *Palmer v. Liggett Group, Inc.*, 825 F.2d at 624-625.

2. The Various Levels of Preemption Analysis

As evidenced by the listing of factors above in *Louisiana Public Service*, the court may consider any number of factors in its preemption analysis. This seems to be part of the problem and may lie at the source of the widely divergent decisions concerning application of preemption analysis. It is apparent that these factors, which were not intended to be an exhaustive treatment of the matter, must be tailored to the particular statute and regulatory scheme promulgated by Congress with a view to determining how the state law (as distinguished from the federal common law) or regulation may affect the federal provisions. In view of the cases on the subject, it is apparent that the only workable "test" is one which considers the statutory language, the entire statute, and its legislative history if necessary, in light of its relationship to the state common law provisions.

3. The Test

A. Express Preemption

Express preemption arises only in certain limited circumstances. Statutes which expressly supersede state law are not common. To determine whether there is express preemption, the court must consult the statute. *Louisiana Public Service*, 476 U.S. at 368. With regard to a finding that no express preemption exists, it is not necessary for a federal statute to provide explicitly that particular state laws are preempted. *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (citing *Hillsborough County*, 471 U.S. 707.

(1) Examination of Statutory Provisions

Although inquiry into legislative motive is often an unsatisfactory venture, *United States v. O'Brien*, 391 U.S. 367, 383 (1968), it nonetheless may be necessary to the determination of the controversy before the court. All provisions in a statute should be given effect. *See U.S. v. Menasche*, 348 U.S. 528, 538-539 (1990). If express preemption is not found by the language of the statute,[5] then the next level of analysis concerns implied preemption. The difficulties of consistent preemption analysis generally begin with implied preemption, as the several factors of that analysis allow the courts a great amount of discretion to determine whether Congress impliedly preempted state law or regulations. As the First Circuit noted in *Palmer*, the gist of preemption is whether Congress (expressly) did or (impliedly) meant to displace state law or state law concepts in enacting the federal law. *Palmer*, 825 F. 2d at 625-626.

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[5] One court addressing the FIFRA statute in a preemption context, did find there was express preemption of the plaintiff's claim based on negligent labeling and failure to warn based on the statutory provision of 7 U.S.C. § 136v(b). *Fitzgerald v. Mallinckrodt*, 681 F.Supp. at 407. To this Court's knowledge, the *Fitzgerald* court is the only court to have found such language to expressly preempt such a claim under FIFRA.

B. Implied Preemption

Implied preemption presents questions which are completely different from the more superficial analysis required in express preemption. The broader issue here arises from the very fact that Congress acted. The court must look at the consequences of that action. The Supreme Court noted recently in *English v. General Electric Co.*, 110 S.Ct. 2270, 2279 (1990):

> Ordinarily, the mere existence of a federal regulatory or enforcement scheme . . . does not by itself imply preemption of state remedies. The Court has observed: 'Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. . . . Instead, we must look for pre-emption.'

(Citing *Hillsborough County*, 471 U.S. at 719.)

On the other hand, it must be noted that "it is not necessary for a federal statute to provide explicitly that particular state laws are preempted." *Ouellette*, 479 U.S. at 491, citing *Hillsborough County*, 471 U.S. at 713.

The more difficult questions begin here: did Congress impliedly preempt the awarding of state tort law damages by a jury when it promulgated 7 U.S.C. § 136v(b)? Some courts have formulated the answer to this question by essentially asking a different question: does the award of damages by a jury amount to state regulation of labeling and packaging which the Congress impliedly preempted in § 136v(b)?

To determine what Congress may have implied, it is necessary to consider the statutory provision in its proper context—the statute as a whole.

Two primary considerations must be noted in the implied preemption context:

> (1) the problem of resolving the potential conflict between § 136v(a) and § 136v(b). Several courts

have not entertained any alternative to the application of § 136v(b) to a plaintiff's state tort law claims for negligence arising from inadequacy of the label. Other courts have noted the provision of § 136v(a) which specifically allows the states to regulate the use of pesticides by states. This is but one of the conflicts created by the divergence of case authority on this subject.

(2) arising from (1) but also standing alone to a certain extent is the (revisited) question of congressional intent. The purpose of the statute is the "ultimate touchstone" of supremacy clause (preemption doctrine) analysis. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987).

Because the whole notion of implied preemption concerns the interpretation of congressional intent and purpose from the statutory language and history, it is important to keep in mind these basic rules of preemption doctrine analysis and construction:

(1) Congressional Purpose

As noted above, there is a wide divergence of case authority as to the statutory purpose and intent of Congress in promulgating the FIFRA and its regulatory scheme. The divergence applies not only to the particular provisions (*e.g.*, §§ 136v(a) and 136v(b)) and how courts have construed their relationship to the FIFRA as a whole, but also to the overall Congressional purpose in enacting FIFRA. It must be recognized that the relationship between the parts and the whole is a crucial one. Although many courts have deemed the analysis of Congressional intent as distasteful, this Court would be shirking its duties if it dismissed such analysis. The court is left no choice but to examine Congressional intent where there is no express preemption. If the Court found no express preemption, but failed to make an examination of the statutory purpose, the court would effectively be

allowing preemption of state laws or regulations merely because the Congress has taken some sort of action in the area.

Congressional Occupation of the Field

Congressional purpose is a legitimate determination in considering the factors of implied preemption. The question whether the regulation of an entire field has been reserved by the Federal Government is, essentially, a question of ascertaining the intent underlying the federal scheme. *Hillsborough County*, 471 U.S. at 714. Although occupation of the field is an otherwise established factor of preemption analysis, the *Silkwood* court noted in considering a state law punitive damages claim which defendants contend was preempted by the Nuclear Regulatory Act (which as previously noted did not contain a preemption clause) that occupation of the field was not the appropriate test, but rather whether, "there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law." 464 U.S. at 256.

Conflict of State Law with Federal Law

The tests which follow the field preemption factor may be characterized as an extension of that test, but are also distinct. The possible incompatibility of the state with the federal law must be examined.

(1) actual conflict

In addition to express or implied preemption, a state law also is invalid to the extent that it "actually conflicts with a . . . federal statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978). See also, *Pacific Gas & Electric Co. v. State Energy Resources Conservation*, 461 U.S. 190, 204 (1983).

(2) potential conflict

A relevant question here is whether compliance with both is impossible. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). A conflict which is not otherwise an "actual conflict" will also be found when the state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." *International Paper Co. v. Ouellette*, 479 U.S. at 492, citing *Hillsborough County*, 471 U.S. at 713.

Incompatibility of State Law with Federal Goals

This is a broad question. It must take into consideration the interests of the state through its tort law, to provide compensation for injuries to its citizens and the federal government, in providing uniform regulation of chemicals used in FIFRA. Whether the court chooses to recognize so or not, the distasteful act of divining congressional intent is of necessity in any substantial preemption analysis, as implied preemption analysis, almost by definition, requires such an undertaking. The balancing of these competing interests has been recognized in the area of intellectual property, where the interest of the federal government, as well as that of the states, is carefully guarded.[6] One particularly relevant question for this stage of analysis is whether Congress intended a balance be struck in the statutory scheme as a whole. This is particularly apparent when the statutory provisions are considered as a whole, with particular attention paid to the provisions regarding state competence

[6] In *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, Justice O'Connor noted the Court's history of analysis with regard to the field of intellectual property: "[t]hus our past decisions have made clear that state regulation of intellectual property must yield to the extent that it clashes with the valance struck by Congress in our patent laws. . . . Where it is clear how the patent laws strike that balance in a particular circumstance, that is not a judgment the State may second guess. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989).

in §§ 136v(a) and (b). The balance between state and federal authority can be distinguished at the level of implied preemption in the aforementioned ways because "we must bear in mind that not every state law that in some remote way may affect the [Congressionally occupied field] . . . can be said to fall within the preempted field. *English v. General Electric Co.*, 110 S.Ct. at 2278.[7]

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[7] In this recent decision, the Supreme Court reviewed the preemption of a plaintiff's claim for intentional infliction of emotional distress by a portion of the Energy Reorganization Act of 1974. The *English* Court considered three questions in particular in examining the preemption issue:

> (1) [C]ongress can define explicitly the extent to which its enactments pre-empt state law. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-98 (1983). Pre-emption fundamentally is a question of congressional intent, see *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988), and when Congress has made its intent known through explicit statutory language, the court's task is an easy one.
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> (2) [I]n the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Although this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized: "[W]here . . . the field which Congress is said to have pre-empted" includes areas that have traditionally been occupied by the States," congressional intent to supersede state laws must be " 'clear and manifest.' " *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) . . .
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> (3) [S]tate law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found preemption where it is impossible for a private party to comply with both state and federal requirements, see, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143

APPLICATION OF THE ANALYSIS TO THE PRESENT CASE

Presented with this veritable smorgasbord of factors for consideration of this motion, the Court will apply the following test, which is premised on U.S. Supreme Court holdings on appropriate factors, as well as a context for their proper consideration.

With regard to the application of the test, the Court will examine two relevant portions of FIFRA, §§ 136v(a) and 136v(b). Both sections are discussed here based on the common factors applicable to them. While Plaintiff may characterize its claim as arising from the "use" of a pesticide, and consequently to which § 136v(a) would apply, the Defendant would characterize the claim as falling under § 136v(b), based on a damage award serving as an indirect regulation of labeling. Because the Court wishes to rise above any semantic distinction based on the particular terms used in the pleadings and relevant papers in this case, and because it feels compelled to examine statutory sections in their proper context, the application of the test will include both sections.

1. EXPRESS PREEMPTION: Is there specific statutory language evidencing congressional intent to preempt state law?

The relevant portion of FIFRA is found at 7 U.S.C. § 136v., entitled "Authority of States."

Analysis of § 136v(a), entitled "In general." This section provides: "A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not

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(1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See also *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981).

English v. General Electric, 110 S. Ct. at 2275.

permit any sale or use prohibited by the Act." This section is clearly an affirmative grant of authority to the states to regulate.

Analysis of § 136v(b), entitled "Uniformity." This section provides: "Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act." Here it is apparent that, by reading this section both in its statutory context, as well as in light of the state law here concerned, there can be no express preemption. The statutory language is not so explicit as to warrant a finding of express preemption where both of the other subsections of § 136v describe affirmatively the state regulation of pesticides, and where the particular admonition to the states does not describe in any meaningful way which action or type of action is prohibited. There certainly is no mention of preemption of state tort claims in § 136v(b).

Accordingly, there is no express preemption found under either of the FIFRA sections under scrutiny here.

2. IMPLIED PREEMPTION

A. OCCUPATION OF THE FIELD: Does state law regulate conduct in a field that Congress intended the Federal Government to occupy exclusively?

The state law under scrutiny here is neither a statute nor a regulation of pesticides (or their labels). Rather, it is the Colorado common law tort of negligence. With this in mind, the Court will consider the federal government's action in the field, namely FIFRA.

FIFRA, at 7 U.S.C. § 136 *et seq.*, provides a means for protecting health, the environment and regulating standards. The regulatory scheme under FIFRA applies to some 40,000 chemicals or mixtures of chemicals used as pesticides. The Act classifies the pesticides and provides a framework for their registration with the Adminis-

trator (of the Environmental Protection Agency). The vast majority of statutory provisions concern the manufacture and sale, and penalties for improper use of pesticides. Registration of a pesticide is done by its manufacturer. If there is more than one manufacturer of a pesticide, there is no standard mandating that the Administrator insure uniformity in that only one (standard) label may issue.[8]

Occupation of the field may be inferred from a pervasive scheme of federal regulation. The scheme of federal regulation under FIFRA does not easily lend itself to a characterization as "pervasive" except as relates to the registration of pesticides, and even in that area there exists much flexibility (albeit under the authority of the EPA Administration).

With regard to § 136v(a), the affirmative grant of authority to states to regulate the sale and use of pesticides remains intact. No occupation of the field is evident here.

With regard to § 136v(b), a certain caveat must be noted: where the field which Congress is said to have preempted includes areas that have been traditionally occupied by the States, congressional intent to supersede must be clear and manifest.[9] Due to the nature of the state law concerned, it remains unclear that the congressional intent under § 136v(b), as well as that supported by the statutory scheme as a whole, was intended to displace the otherwise available state tort remedy.

Having determined that field preemption is not indicative of any congressional intent to preempt the Plain-

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[8] See *Palmer v. Liggett Group* for distinctions drawn between the scheme of federal regulation between FIFRA and the Cigarette Act. 825 F.2d at 628-629.

[9] *See English v. General Electric Co.*, 110 S. Ct. at 2275, citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

tiff's state tort claim, the Court now turns to the two remaining factors of implied preemption.

B. ACTUAL CONFLICT: Is it impossible for a private party (i.e., Dow) to comply with both state and federal requirements?

The state law requirement for the tort of negligent failure to warn would dictate that the manufacturer (or perhaps seller or distributor) exercise the requisite duty of care (assuming such duty is found to exist) to warn of any dangerous properties which could cause harm to Plaintiff or his property through the use of pesticides.

The federal law requirements in this regard mandate simply that the manufacturer register the pesticide, and prescribes the manner in which this is done. The FIFRA does not mandate such registration procedure for any stated purpose other than regulating pesticides and their use for the protection of humans and the environment. With such broadly stated goals in mind, the FIFRA provides a framework for regulating standards within the pesticide industry. The dearth of specific provision as to how such goals might be carried out is indicative of FIFRA's nature as setting forth minimum standards. These minimum standards stand in sharp contrast to other congressional regulatory schemes.[10]

For these reasons, there exists no actual conflict between the state law requirements and federal law requirements in FIFRA under either § 136v(a) or § 136v (b). There is no reason why a private party, situated as Dow is, could not comply with both sets of requirements.

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[10] Other regulatory schemes which indicate much more thorough involvement by the federal government include: intellectual property, *see Bonito Boats*, 489 U.S. at 152; labor relations, *see English*, 110 S. Ct. at 2279, n.8; and the Cigarette Act, *see Palmer*, 825 F.2d at 628.

C. POTENTIAL CONFLICT: Is the state law incompatible with federal goals? OR Did Congress leave no room for supplementary state regulation?

With regard to this question and its consideration after the actual conflict issue, it may appear academic to examine this question. However, the Court will undertake consideration of this question as it is possible that although no actual conflict exists, due to the nature of the relationship between the two sets of "regulation," a conflict could arise.

It goes without saying that the Court could not consider the question of whether a conflict will arise, as no such issue is presented, and if it were, it certainly would not be ripe for consideration at this time.

Once again, the Court must note the distinction between the two statutory sections under consideration here. Because the grant of authority contained in § 136v(a) for regulating the use of pesticides allows the states broad authority to regulate in that area, no potential conflict could arise here.

With regard to § 136v(b), however, the test at this point is critical as it hinges on interpretation—both of congressional intent and the type of state regulation which it prohibits. It must be noted again here, that the court is required to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written. *Jones v. Rath Packing Co.*, 430 U.S. at 526. With the federal statute and its relevant regulations under consideration, the Court notes that the basic purpose of the statute is to regulate the labelling of such products to provide purchasers with assurance of effectiveness and safety when used in compliance with the manufacturer's instructions. *Roberts v. Dow Chemical Co.*, 702 F. Supp. 195, 196 (N.D. Ill. 1988) citing *Continental Chemiste Corp. v. Ruckelshaus*, 461 F. 2d 331, 335 (7th Cir. 1972).

In light of the meaning of § 136v(b) in context of the overall statutory purpose of FIFRA, the Court will now consider the consequences which the state law *may* have on this federal scheme of regulation. The state tort claim here at issue is an interest which may be characterized as "peculiarly local" in concern, due to its nature as a common law claim for negligence.[11] Any potential conflict which might arise from a jury award of damages cannot be characterized as a conflict with the statutory regulation scheme of FIFRA due to its failure to address any aspect of state tort recovery in either its statutory language or its regulation. It cannot be assumed that because it failed to specifically mention this possibility, it is nonetheless foreclosed. FIFRA's relatively flexible nature of regulating pesticides and their distribution forecloses such a conclusion.[12]

This Court accordingly finds that there is no potential conflict between the state tort claim and the FIFRA provision of § 136v(b).

In conclusion, the Court finds that there is no potential preemption of Piaintiff's state tort law claim for damages based on negligent failure to warn.

It is therefore ORDERED, Defendant Dow Chemical Company's motion for summary judgment is DENIED.

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[11] This "peculiarly local" classification is of concern here also with regard to whether Congress intended to displace the state tort claim for damages. *See National Agricultural Chemicals Association v. Rominger*, 500 F. Supp. 465, 470 (E.D. Cal. 1980), citing *Florida Lime*, 373 U.S. at 146.

[12] One court has characterized this relationship in a somewhat similar manner with regard to implied preemption analysis: [t]he fact that EPA has determined that Chevron's label is adequate *for purposes of FIFRA* does not compel a jury to find that the label is also adequate *for purposes of state tort law* a. well." (Emphasis in original.) *Ferebee v. Chevron Chemical Co.*, 736 F.2d at 1540.

DATED at Denver, Colorado, this 22nd day of October, 1990.

BY THE COURT:

/s/ Daniel B. Sparr
DANIEL B. SPARR
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JUDGE DANIEL B. SPARR

Civil Action No. 89 S 1726

ARKANSAS-PLATTE & GULF PARTNERSHIP,
Plaintiff,

v.

VAN WATERS & ROGERS, INC., a Washington corporation; THE DOW CHEMICAL COMPANY, a Delaware corporation; and XYZ COMPANIES,
Defendants.

ORDER

[Filed Jan. 22, 1991]

THIS MATTER comes before the Court on Defendant The Dow Chemical Company's motion for reconsideration of the Court's order entered October 22, 1990. The Defendant seeks this Court's reconsideration or amendment of its Order denying the Defendants' motion for summary judgment. As its basis for reconsideration or amendment, Dow Chemical Company asserts that the Court improperly considered its motion for summary judgment as limited only to preemption of Plaintiff's negligent failure to warn claim. Dow Chemical asserts that its motion was directed at *any* failure to warn claim, regardless of legal theory.

At this time the Court merely wishes to note that it appears the Defendant Dow Chemical Company is essentially seeking reargument of its motion. At the hearing on this motion, Defendant Dow Chemical relied primarily

on the decision in *Kennan v. Dow Chemical Co.*, 717 F. Supp. 799 (M.D. Fla. 1989) for its argument that FIFRA (Federal Insecticide, Fungicide and Rodenticide Act) preempts state law failure to warn claims (transcr. at 7). Both the *Kennan* court, as well as the argument forwarded by the Defendant Dow Chemical Company, rely for support on the earlier decision of *Fitzgerald v. Mallinckrodt, Inc.*, 681 F.Supp. 404 (E.D. Mich. 1987): "FIFRA's preemption of state law claims based on theories of negligent labeling and failure to warn was recognized in *Fitzgerald* . . ." *Kennan*, 717 F.Supp. at 805. Of particular note is the court's ruling in *Kennan*, which states: "To the extent that plaintiff's claims are based on the defective and unreasonably dangerous condition of defendants' products due to defendants' failure to warn, plaintiff's claims are preempted as a matter of law. To the extent that plaintiff's claims are otherwise based on the defectiveness or unreasonable dangerousness of defendants' product on theories of defective design or manufacturing flaw, the motion for summary judgment is denied." *Id.* at 812.

Accordingly, the Defendant Dow Chemical Company's motion to reconsider is DENIED.

The Court hereby certifies its order of October 22, 1990 denying summary judgment for appeal pursuant to 28 U.S.C. 1292(b). Further proceedings in this matter shall not otherwise be stayed by this Court unless a party requests a stay of the proceedings within 10 days of this Order.

DATED at Denver, Colorado, this 22 day of January, 1991

BY THE COURT:

/s/ Daniel B. Sparr
DANIEL B. SPARR
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-527

THE DOW CHEMICAL COMPANY;
VAN WATERS & ROGERS, INC.,
Petitioners,

v.

ARKANSAS-PLATTE & GULF PARTNERSHIP,
Respondent.

ORDER

Filed February 26, 1991

Before LOGAN and EBEL, Circuit Judges.

This matter comes on for consideration of the petition of The Dow Chemical Company and Van Waters & Rogers, Inc. for permission to appeal under 28 U.S.C. Section 1292(b).

Upon consideration whereof, the petition for leave to appeal is granted.

The date of this order shall serve as the date of the notice of appeal for calculating filing times under the Federal Rules of Appellate Procedure and the Tenth Circuit Rules. Briefing shall follow 10th Cir. R. 31.1.

Entered for the Court

ROBERT L. HOECKER
Clerk

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-1085

ARKANSAS-PLATTE & GULF PARTNERSHIP,
a Colorado general partnership,
Plaintiff-Appellee,

v.

VAN WATERS & ROGERS, INC., a Washington corporation;
THE DOW CHEMICAL COMPANY, a Delaware corporation,
Defendants-Appellants.

NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION; WESTERN AGRICULTURAL CHEMICALS ASSOCIATION; NATIONAL PEST CONTROL ASSOCIATION; NATIONAL AGRICULTURAL AVIATION ASSOCIATION; CHEMICAL SPECIALTIES; AMERICAN WOOD PRESERVERS INSTITUTE; CHEMICAL MANUFACTURERS ASSOCIATION; PRODUCT LIABILITY ADVISORY COUNCIL, INC.; TRIAL LAWYERS FOR PUBLIC JUSTICE,
Amici Curiae.

Appeal from the United States District Court
for the District of Colorado
D.C. No. 89-S-1726

[Filed Mar. 6, 1992]

Richard R. Young (Brent E. Rychener and Walter H. Sargent, with him on the briefs) of Holme Roberts & Owen, Colorado Springs, Colorado, for Plaintiff-Appellee.

David A. Bailey (Dean R. Massey and Anne D. Weber, with him on the briefs) of Parcel, Mauro, Hultin & Spaanstra, P.C., Denver, Colorado, for Defendant-Appellant, Van Waters & Rogers, Inc.

C. Michael Montgomery (Peter S. Dusbabek, Montgomery, Green, Jarvis, Kolodny & Markusson, Denver, Colorado; and Edward B. Fitzpatrick, III, The Dow Chemical Company, Midland, Michigan, with him on the briefs), of Montgomery, Green, Jarvis, Kolodny & Markusson, Denver, Colorado, for Defendant-Appellant, The Dow Chemical Company.

Lawrence S. Ebner, McKenna & Cuneo, Washington, D.C.; Charles S. Siegel, Baron & Budd, P.C., Dallas, Texas; and Arthur H. Bryant and Priscilla Budeiri, Trial Lawyers for Public Justice, Washington, D.C., on the briefs for Amici Curiae.

Before LOGAN and MOORE, Circuit Judges, and ALLEY, District Judge.*

MOORE, Circuit Judge.

In 1985 plaintiff Arkansas-Platte & Gulf (AP&G) succeeded to ownership of property in Colorado which previously had been occupied by a wooden fence-post treatment facility. That facility used a pentachlorophenol product, "Dowicide 7," from approximately 1960 to 1972. In 1987, an AP&G employee was diagnosed with pentachlorophenol poisoning. AP&G filed suit in 1989 against Van Waters & Rogers and The Dow Chemical Company as pentachlorophenol manufacturers or distributors, asserting Colorado state tort claims of negligence and strict

* The Honorable Wayne E. Alley, United States District Court Judge for the Western District of Oklahoma, sitting by designation.

liability based on a failure to warn of the product's environmental hazards. Dow and Van Waters & Rogers moved for summary judgment, asserting the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (FIFRA), preempts state common law tort claims based on labeling. The district court denied summary judgment, holding there was no express or implied preemption by FIFRA of state tort claims based on negligent failure to warn. *Arkansas Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 748 F. Supp. 1474, 1482, 1484 (D. Colo. 1990).

On motion of the defendants, the district court certified this question for interlocutory appeal. We may take interlocutory appeals when there is a substantial question of law and an immediate appeal will materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292 (b). We review motions for summary judgment *de novo*. *City of Chanute, Kan. v. Williams Natural Gas Co.*, —— F.2d ——, 1992 WL 12682, at *2 (10th Cir. 1992). *See also Barnson v. United States*, 816 F.2d 549, 552 (10th Cir.), *cert. denied*, 484 U.S. 896 (1987). If no genuine issue of material fact exists, we determine if the substantive law was correctly applied. *Applied Genetics Int'l v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990), citing *Osgood v. State Farm Mut. Auto. Ins. Co.*, 848 F.2d 141, 143 (10th Cir. 1988). There is no dispute of fact on the preemption issue before us. The parties disagree about (1) what body of FIFRA law should be applied, and (2) whether state law is preempted. We reverse the denial of summary judgment to the defendants, and hold FIFRA impliedly preempts state tort actions based on labeling and alleged failure to warn.

I. Applicable Law

AP&G argues its claims originate from actions occurring from 1960 to 1972, and thus FIFRA provisions enacted in 1972 cannot affect defendants' pre-exposure

duties. In the alternative, AP&G asserts neither the 1947 Act nor the 1972 amendments preempt state common law failure to warn claims, and the distinction is unimportant. We disagree with both arguments.

While pre-1972 FIFRA law concerning labeling is similar to the legal regime set forth in the 1972 amendments, it is not identical. FIFRA was enacted in 1947 as a licensing and labeling statute replacing the Insecticide Act of 1910. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991, 104 S. Ct. 2862, 2866 (1984). The 1947 Act gave the Agriculture Department authority to regulate, register, and label "economic poisons and devices." *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799, 804 (M.D. Fla. 1989). There was no provision in the 1947 Act, however, specifically restricting state authority over pesticide labels.

In contrast, the 1972 amendments significantly strengthened the Act's registration and labeling standards, constructing a comprehensive regulatory regime. *Wisconsin Pub. Intervenor v. Mortier*, —— U.S. ——, 111 S. Ct. 2476, 2480 (1991), citing *Ruckelshaus*, 467 U.S. at 991, 104 S. Ct. at 2867. The 1972 provisions sought to "regulate the use of pesticides to protect man and his environment," and "extend Federal pesticide regulations to actions *entirely within a single State*." *Kennan*, 717 F. Supp. at 804, citing S. Rep. No. 92-838, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993. Section 136v, addressing the "authority of states" provides:

> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide . . . in the State, but *only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.*

(b) Uniformity

Such State shall not impose or continue in effect *any requirements for labeling or packaging in addition to or different from* those required under this subchapter.

7 U.S.C. § 136v(a), (b) (emphasis added).

A plain reading of the statute indicates an intent to maintain the traditional police powers of the states in the general grant of authority to "regulate the sale or use" of pesticides, § 136v(a), and a more specific intent to occupy the field in labeling and packaging, § 136v(b). Section 136v(c) further examines the states' prerogatives for registering pesticides for uses to meet special local needs. Clearly if the 1947 Act did not specifically restrict state authority over labeling, the 1972 amendments instruct a different interpretation of the preemption of state law.

Like the district court, we find plaintiff's contention that we should apply pre-1972 FIFRA law unavailing. AP&G relies on *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377 (10th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 799 (1991), arguing the application of current FIFRA law to past events would present a question of retroactivity. *DeVargas* addressed the retroactive application of statutory amendments which became effective during the pendency of that litigation. The court held in the absence of clear congressional intent instructing retroactive application, the law should be applied prospectively. *DeVargas*, 911 F.2d at 1388, 1393.[1]

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[1] *DeVargas* found two lines of Supreme Court precedent, *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 94 S. Ct. 2006 (1974), and *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S. Ct. 468 (1988), were in "irreconcilable conflict" in applying statutes whose intent on retroactivity is unclear. *DeVargas*, 911 F.2d at 1390. *Bradley* held when congressional intent is unclear,

If this case presented a question of retrospective application of a statute, we would indeed apply *DeVargas*. The issue here, however, does not concern retroactivity, but rather when plaintiff's cause of action arose. Our examination of the claim leads us to conclude it arose after 1972. AP&G acquired its property in 1985, found the property contaminated in 1987, and filed suit in 1989. Even were we to assume plaintiff's cause of action ripened prior to 1972, we have said it is "fundamental" that "a statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends are drawn from a time antecedent to the enactment." *Lohf v. Casey*, 466 F.2d 618, 620 (10th Cir. 1972), citing *Cox v. Hart*, 260 U.S. 427, 43 S. Ct. 154 (1922). *DeVargas* is therefore not on point.

Furthermore, any jury award on claims arising from a duty to label or warn has an impact on FIFRA as it presently exists. As the court stated in *Kennan v. Dow Chem. Co.*, "[w]hether or not the decedent was exposed prior to 1972 does not negate the fact that a jury award today would constitute regulation by causing manufacturers to change their labels . . . . Congress has expressly preempted such regulation by the states." 717 F. Supp. at 811. We therefore apply FIFRA as amended.

" 'a court is to apply the law in effect at the time it renders its decision,' " except where application of the law would result in "manifest injustice." *DeVargas*, 911 F.2d at 1388-389, citing *Bradley*, 416 U.S. at 711, 94 S. Ct. at 2016. *DeVargas* found *Bowen* stated a contrary rule, that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *DeVargas*, 911 F.2d at 1389, citing *Bowen*, 109 S. Ct. at 471. "Faced squarely with the issue [of] . . . which presumption—*Bradley* or *Bowen*—is to govern," the *DeVargas* court found *Bowen* was supported by the weight of Supreme Court authority, and held the Civil Rights Restoration Act of 1987 did not apply retroactively. *DeVargas*, 911 F.2d at 1392-93.

II. Preemption Doctrine

The preemption doctrine is based on the Supremacy Clause of Article Six of the Constitution. U.S. Const. art. VI, cl. 2. The Supremacy Clause invalidates state laws that interfere with, or are contrary to" federal law. *Hillsborough County, Fla. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 712, 105 S. Ct. 2371, 2375 (1985), citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (Marshall, C.J.). The burden of proving preemption is on defendants, who must show Congress meant FIFRA to preempt state tort claims based on failure to warn.

Preemption turns on the intent of Congress and on the effect of the conflicting rule. Intent may be express, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 1309 (1977), or inferred when Congress has chosen to occupy a particular field and "a scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. at 2481, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947). Even when the field is not occupied, we may still infer preemption to the extent state and federal law conflict. This may be when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S. Ct. 1210, 1217-18 (1963), when federal law implies a barrier to state regulation, *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368, 106 S. Ct. 1890, 1898 (1986), citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890 (1983), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404 (1941).

III. Failure to Warn Claims Based on Labeling

Several courts have considered whether FIFRA preempts state tort claims based on labeling and alleged failure to warn with conflicting results. The Eleventh Circuit held state common law tort labeling claims are impliedly preempted by FIFRA, 7 U.S.C. § 136v(b). *Papas v. Upjohn Co.*, 926 F.2d 1019, 1024 (11th Cir. 1991), *petition for cert. filed,* 59 U.S.L.W. 3825 (U.S. May 29, 1991) (No. 90-1837).[2] While FIFRA explicitly instructs states can regulate the *sale or use* of federally registered pesticides, § 136v(b) precludes "any requirements for *labeling or packaging* in addition to or different from those required pursuant to this act." *Id.* (emphasis added). The *Papas* court reasoned jury awards of damages in these actions would result in direct conflict with federal law. *Id.* at 1025. We agree.

The Administrator of the EPA is charged under the statute with determining whether the pesticide "when used in accordance with widespread and commonly recognized practice . . . will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(D). The EPA considers these adverse effects in determining what labels comply with FIFRA's requirements. 7 U.S.C. § 136a(c)(5)(B). The labels " 'must be adequate to protect the public from fraud and from personal injury and to prevent unreasonable adverse effects on the environment' " *Papas,* 926 F.2d at 1024, citing 40 C.F.R. § 156.10(i)(1)(i).

State court damage awards based on failure to warn would constitute ad hoc determinations of the adequacy of statutory labeling standards. This would hinder the

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[2] *Compare Kennan v. Dow Chem. Co.*, 717 F. Supp. at 807 ("FIFRA expressly preempts state law regulation of pesticide labeling . . . ."); *and Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404, 406 (E.D. Mich. 1987) ("Congress has expressly stated its intent to preempt any state labeling or packaging requirements different from or additional to those mandated by FIFRA," citing § 136v(b)).

accomplishment of the full purpose of § 136v(b), which is to ensure uniform labeling standards. *Papas* noted even if a state tort action accomplished the same goal as the federal statutory provisions, federal law would still preempt the state action because "it attempts to achieve that purpose by a method which interferes with the federal methods." 926 F.2d at 1026, citing *International Paper Co. v. Ouellette*, 479 U.S. 481, 497, 107 S. Ct. 805, 813 (1987).

We decline to follow the D.C. Circuit's holding in *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062, 105 S. Ct. 545 (1984), as suggested by AP&G. *Ferebee* involved a suit by the estate of an agricultural worker against Chevron alleging Chevron's failure to label paraquat with an adequate warning caused Mr. Ferebee's lung disease and subsequent death. The D.C. Circuit held the tort action was not preempted by FIFRA, basing its holding on the general grant of authority to the states in § 136v(a) to regulate the use of FIFRA-controlled products within state borders. *Ferebee*, 736 F.2d at 1541. We do not agree with the D.C. Circuit that because labeling can be part of the compensatory objectives of the state in regulating use, the general grant of § 136v(a) encompasses authority over labeling.[3] Section 136v(b) clearly narrows the general grant of § 136v(a) to *exclude* "requirements for labeling or packaging."

Ferebee distinguished between the "direct" injunction against the states' imposing labeling requirements and requirements which might be imposed through state common law. *Id.* The court reasoned the EPA's determination that Chevron's label was adequate *"for FIFRA pur-*

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[3] "Given this provision [§ 136v(a)], Maryland might well have the power to ban paraquat entirely . . . . As a result, Maryland is entitled to control the use of paraquat for compensatory aims by holding Chevron liable for injuries that could have been prevented by a more adequate label." *Ferebee*, 736 F.2d at 1541.

poses does not compel a jury to find that the label is also adequate *for purposes of state tort law . . . .*" *Ferebee*, 736 F.2d at 1540 (emphasis in *Ferebee*). *Ferebee* further stated:

> The verdict itself does not command Chevron to alter its label—the verdict merely tells Chevron that, if it chooses to continue selling paraquat in Maryland, it may have to compensate for some of the resulting injuries. That may in some sense impose a burden on the sale of paraquat in Maryland, but it is not equivalent to a direct regulatory command that Chevron change its label . . . .

Ferebee, 736 F.2d at 1541.[4]

We do not accept this "choice of reaction" analysis. A business choice between paying damages and changing the label is only notional. As the First Circuit stated in *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987):

> Once a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability. The most obvious change it can take . . . is to change its label.

Id. at 627-28. This choice cannot be consistent with FIFRA's preclusion of "any requirements for labeling or packaging in addition to or different from" the statutory mandate. 7 U.S.C. § 136v(b).

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[4] *See also Ferebee*, 736 F.2d at 1542 ("Compliance with both federal and state law cannot be said to be impossible: Chevron can continue to use the EPA-approved label and can at the same time pay damages to successful tort plaintiffs such as Mr. Ferebee; alternatively, Chevron can petition the EPA to allow the label to be made more comprehensive.").

AP&G relies on *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S. Ct. 615 (1984), which stated there was no "irreconcilable conflict between the federal and state standards," and that the "imposition of a state standard in a damages action" would not "frustrate the objectives of the federal law." 464 U.S. at 256, 104 S. Ct. at 626. We distinguish *Silkwood* because it construes the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, a statute with substantially different regulatory and safety goals from FIFRA. The Atomic Energy Act contains no pre-emption provision and reserves significant authority to the states. "Further, the enactment and legislative history [of the Act] make clear Congress' explicit judgment that state common law damage actions for injuries caused by nuclear operations should be permitted to continue." *Palmer v. Liggett Group*, 825 F.2d at 628. In contrast, FIFRA does specify restrictions on state authority in labeling, and the legislative history of FIFRA is not clear on the question of state common law tort actions based on labeling and failure to warn.

Our thinking is bolstered by the Supreme Court's recent decision in *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476 (1991). In *Mortier*, a Wisconsin town granted plaintiff a permit for pesticide spraying with certain use restrictions. Plaintiff claimed the town ordinance was preempted by FIFRA and state statute. The Supreme Court disagreed, holding FIFRA did not preempt political subdivisions from regulating the *use* of pesticides, "either explicitly, implicitly, or by virtue of an actual conflict." *Id.* at 2482. The Court found FIFRA had not occupied the field of pesticide regulation in general or of local use permitting in particular. *Id.* at 2486. According to *Mortier*, the specific grant of authority in § 136v(a) ensures the states can "continue to regulate *use and sales* even where, such as with regard to the banning of *mislabeled products*, a *narrow pre-emptive overlap* might occur." *Id.* (emphasis added).

This "narrow preemptive overlap" is precisely the issue before us. In dicta addressing FIFRA's preemption of labeling claims, the Court stated:

> [F]ield pre-emption cannot be inferred. In the first place, § 136v itself undercuts such an inference. The provision immediately following the statute's grant of regulatory authority to the States declares that "[s]uch State shall not impose or continue in effect any requirements for labeling and packaging in addition to or different from those required under" FIFRA. 7 U.S.C. § 136v(b). *This language would be pure surplusage if Congress had intended to occupy the entire field of pesticide regulation.*
>
> *Id.* at 2486 (emphasis added).[5]

Thus, the Supreme Court reasoned Congress had not occupied the entire field of pesticide regulation, instead leaving intact the states' historic police powers to consider regional and local factors in regulating *use*. The Court indicated, however, Congress had impliedly preempted state regulation in the more narrow area of *labeling*. While the holding of *Mortier* is confined to the regulation of pesticides by local governments, *id.* at 2479, we are nevertheless inclined to adopt its construction of FIFRA.[6]

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[5] *See also* 111 S. Ct. at 2487. "As we have . . . made plain, local use permit regulations—*unlike labeling or certification*—do not fall within an area that FIFRA's 'program' pre-empts or even plainly addresses." (emphasis added).

[6] Several district courts have considered preemption with respect to labeling and failure to warn claims since *Mortier* and followed its dicta. *See, e.g., Young v. American Cyanamid Co.*, Civ. No. B-C-90-89 (E.D. Ark. N.D. Oct. 21, 1991) (unpublished order); *Worm v. American Cyanamid Co.*, Civ. A. No. HAR-90-1424, 1991 WL 144328 (D. Md. July 12, 1991) (unpublished opinion). *Cf. Montana Pole & Treating Plant v. I.F. Laucks*, 775 F. Supp. 1339 (D. Mont. 1991) (adopting *Ferebee* and declining to follow *Papas* in case involving labeling of pentachlorophenol). In our opinion, *Montana Pole* wrongly relies on *Mortier* without considering the Court's

IV. Summary

We therefore hold state tort actions based on labeling and alleged failure to warn are impliedly preempted by FIFRA as a matter of law. This is by virtue of the direct conflict posed with federal uniform regulation of pesticides, and because we believe Congress intended to occupy the field of pesticide labeling regulation. We base our holding on the language of § 136v, our rejection of the *Ferebee* court's "choice of reaction" analysis, and our understanding of the Supreme Court's construction of FIFRA in *Mortier*. We need not reach the district court's holding there is no express FIFRA preemption, and emphasize our holding only concerns the narrow issue of labeling. We do not address other state tort claims by AP&G which may be pending against the defendants.[7]

We therefore REVERSE the decision of the district court denying defendants' summary judgment on plaintiff's state tort claims based on labeling and failure to warn, and REMAND for further proceedings.

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distinction between preemption of state regulation of the *sale and use* of pesticides, and state authority over *labeling*. *Montana Pole*, 775 F. Supp. at 1344.

[7] *See, e.g., Kennan*, 717 F. Supp. at 812 (while finding express preemption of failure to warn claims in § 136v(b), court "state[d] no view as to whether . . . defense of unavoidable dangerousness ha[d] been preempted"); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283, 1289 (W.D. Mo. 1989) (FIFRA preempts common law failure to warn claims, but not claims that herbicide sold in unreasonably dangerous condition).

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK
Washington, D.C. 20543

October 13, 1992

Mr. Walter H. Sargent
Holme, Roberts & Owen
90 South Cascade Avenue, #1300
Colorado Springs, CO 80903

Re: Arkansas-Platte & Gulf Partnership
v. Dow Chemical Company, et al.
No. 92-203

Dear Mr. Sargent:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of Cipollone v. Liggett Group, Inc., 505 U.S. —— (1992).

Very truly yours,

/s/ William K. Suter
WILLIAM K. SUTER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-1085
(D.C. No. 89-S-1726)

ARKANSAS-PLATTE & GULF PARTNERSHIP,
a Colorado general partnership,
Plaintiff-Appellee,

v.

VAN WATERS & ROGERS, INC., a Washington corporation;
THE DOW CHEMICAL COMPANY, a Delaware corporation,
Defendants-Appellants,

NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION; WESTERN AGRICULTURAL CHEMICALS ASSOCIATION; NATIONAL PEST CONTROL ASSOCIATION; NATIONAL AGRICULTURAL AVIATION ASSOCIATION; CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION; AMERICAN WOOD PRESERVERS INSTITUTE; CHEMICAL MANUFACTURERS ASSOCIATION; PRODUCT LIABILITY ADVISORY COUNCIL, INC.; TRIAL LAWYERS FOR PUBLIC JUSTICE,

Amici Curiae.

ORDER

Filed October 19, 1992

Before LOGAN, MOORE, Circuit Judges, and ALLEY*, District Judge.

The court on its own motion orders the parties to file, within twenty days of the date of this order, a memorandum brief not to exceed fifteen pages addressing the applicability of Cipollone v. Liggett Group, Inc., 505 U.S. 112 S. Ct. 2608 (1992).

Entered for the Court

ROBERT L. HOECKER
Clerk

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

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* Honorable Wayne E. Alley, United States District Judge for the Western District of Oklahoma, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-1085
(D.C. No. 89-S-1726)

ARKANSAS-PLATTE & GULF PARTNERSHIP,
a Colorado general partnership,
Plaintiff-Appellee,

v.

VAN WATERS & ROGERS, INC., a Washington corporation;
THE DOW CHEMICAL COMPANY, a Delaware corporation;
Defendants Appellants.

ORDER

Entered April 16, 1992

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges, and ALLEY*, District Judge.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

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* The Honorable Wayne E. Alley, United States District Judge for the Western District of Oklahoma, sitting by designation.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-1085
(D.C. No. 89-S-1726)

ARKANSAS-PLATTE & GULF PARTNERSHIP,
a Colorado general partnership,
Plaintiff-Appellee,

v.

VAN WATERS & ROGERS, INC., a Washington corporation;
THE DOW CHEMICAL COMPANY, a Delaware corporation,
Defendants-Appellants,

NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION; WESTERN AGRICULTURAL CHEMICALS ASSOCIATION; NATIONAL PEST CONTROL ASSOCIATION; NATIONAL AGRICULTURAL AVIATION ASSOCIATION; CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION; AMERICAN WOOD PRESERVERS INSTITUTE; CHEMICAL MANUFACTURERS ASSOCIATION; PRODUCT LIABILITY ADVISORY COUNCIL, INC.; TRIAL LAWYERS FOR PUBLIC JUSTICE,
Amici Curiae.

ORDER

Entered February 9, 1993

Before McKAY, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK,

BRORBY, EBEL, and KELLY, Circuit Judges, and ALLEY*, District Judge.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

ROBERT L. HOECKER
Clerk

By: /s/ Barbara Schemerkin
Deputy Clerk

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* Honorable Wayne E. Alley, United States District Court for the Western District of Oklahoma, sitting by designation.